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FILED
NOV 17 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-582

In The

Supreme Court of the United States

October Term, 1998

HOLLY GOTTFRIED,

Petitioner,

vs.

MEDICAL PLANNING SERVICES, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PATRICK J. PEROTTI
Counsel of Record

SHAWN W. MAESTLE
SUSAN E. RUSNAK

DWORKEN & BERNSTEIN CO., L.P.A.
153 E. Erie Street, Suite 304
Painesville, Ohio 44077
(440) 352-3391 / 946-7656

Attorneys for Petitioner

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INTRODUCTION

In this case, both sides agree that the Sixth Circuit created a new abstention-deferral doctrine. The issue presented for certiorari is significant:

> Should the "abstention" doctrines announced by this Court now be expanded to require a person suffering a direct and immediate violation of their constitutional rights to first seek relief in state court before a federal court will act. Put more bluntly, when confronted with a clear, unambiguous and facially unconstitutional state provision, does this Court intend Pullman abstention to be used, on the ground that state judges are "equal to the task" of addressing federal constitutional claims?

This question is presented in the context of the rights of a nonparty stranger to a state court injunction which is clear, unambiguous and facially unconstitutional to bring a First Amendment challenge in federal court under 42 U.S.C. § 1983 without having to resort to state court first. Simply put, the challenged state provision expressly binds all the world, and bars anyone from picketing on certain public sidewalks.

Respondent opposes certiorari, arguing that the provision does not bind the world; is unclear; and the Sixth Circuit merely sent the matter to state court to clarify ambiguity, as allowed by Pullman. Respondent's argument is nonsense.

The subject injunction is clear and unambiguous, and

the parties stipulated that it binds the whole world.[1] Both the District Court and the Sixth Circuit acknowledged that the injunction is clear and unambiguous on its face, and binds the world.[2] An injunction which bars everyone from picketing on a public sidewalk is facially unconstitutional. United States v. Grace, 461 U.S. 171 (1983).

The Sixth Circuit was fully aware of the constitutional infirmity presented by this type of "all the world" injunction (now unfortunately all too common).[3] However, after finding that none of the abstention doctrines applied, Gottfried, 143 F.3d at 326-330, the Sixth Circuit nonetheless proceeded to create a new abstention doctrine that requires members of the general public to commence an action in state court, not to challenge any ambiguity, but to correct federal, facial unconstitutionality. The Sixth Circuit did so on the reasoning that the "state court is equal to the task" of federal courts in adjudicating federal rights.

This new creation is in direct conflict with the rule imposed by other circuits in these circumstances; and, it is in direct conflict with the limitations imposed by Pullman.

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[1] The injunction prohibits members of the general public from engaging in any type of peaceful, lawful speech on the public sidewalks involved. Stip ¶ 11-12.

[2] District Court Finding, ¶ 10; Gottfried v. Medical Planning Services, Inc., 142 F.3d 326, 328 (6th Cir. 1998) ("It prohibits anyone from picketing.").

[3] As the Opinion reads: "A state court injunction broad enough to restrict the speech rights of those who were not parties to the underlying litigation raises as many problems of federal jurisdiction as constitutional difficulties." Gottfried, 142 F.3d at 330.

If such a drastic change in this most important area of federal law is to be made, the change should be nationwide and come from the U.S. Supreme Court. Persons in the Sixth Circuit should not be saddled with something the citizens in other circuits do not face.

REPLY TO RESPONDENT'S ARGUMENTS

I. THE SIXTH CIRCUIT APPLIED THE PRINCIPLES UNDERLYING PULLMAN TO CREATE A NEW ABSTENTION DOCTRINE THAT CONFLICTS WITH RULINGS OF THIS COURT AND OF OTHER CIRCUITS.

Respondent argues that the Sixth Circuit did not use the Pullman doctrine. Petitioner does not dispute this. Pullman would not allow the Sixth Circuit to do what it did. That is why we are here.

The Sixth Circuit created a new abstention doctrine in deciding this case. The Sixth Circuit did so relying upon the principles underlying Pullman.[4] However, the Sixth Circuit's new abstention doctrine is inconsistent with Pullman and in direct conflict with prior decisions of this Court, and the decisions of other Circuits.

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[4] The Sixth Circuit conceded that it was applying the principles underlying Pullman to create a new form of abstention. See Gottfried, 142 F.3d at 330-331 (As the court indicated, "The policies underlying the abstention doctrine of Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), suggest this is the correct result."). Indeed, reference to Pullman and its underlying concerns for federal-state comity appear throughout the Sixth Circuit Opinion. See Id. at 330-331, 333.

Pullman abstention requires a federal court to defer from deciding a federal constitutional question when faced with an ambiguous and unclear issue of state law susceptible to an interpretation that would obviate the federal issue involved. See e.g., Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus, 60 F.3d 122, 126 (2d Cir. 1995). In direct conflict with Pullman, the Sixth Circuit has created an abstention doctrine which requires a federal court faced with a § 1983 challenge to a clear and unambiguous state court provision to defer providing immediate relief until the state court is given the first opportunity to address the federal constitutional issue. But Pullman does not require a person suffering a violation of their federal rights from an unambiguous state provision to "exhaust state remedies" before the doors to the federal courthouse will open for them.

The new rule created by the Sixth Circuit also directly conflicts with other Circuits. In Machesky v. Bizzell, 414 F.2d 283, 291 (5th Cir. 1969), the Fifth Circuit set forth the unambiguous rule that abstention is not available in the case of an unambiguous state provision, specifically an injunction banning the general public from picketing on public sidewalks. The Fifth Circuit also recognized that abstention based on federal-state comity concerns is inappropriate where a state provision is attacked on its face as repugnant to the First Amendment. Id. at 291. The Sixth Circuit now requires the opposite approach.

In Wilbur v. Harris, 53 F.3d 532 (2nd Cir. 1995), the Second Circuit followed the rule for its Circuit that Pullman may not be extended as a mechanism for imposing an exhaustion requirement in a § 1983 action. In conflict with Wilbur, the Sixth Circuit now holds that its "newly created" abstention rule is required, and a party in these

circumstances must "exhaust her remedies in state courts." Gottfried, 142 F.3d at 333.[5]

This Court should grant certiorari to resolve these inter-circuit conflicts over whether a federal court may abstain despite the fact that the state provision is neither unclear nor ambiguous, and whether a federal court may create a new abstention doctrine requiring deferral when federal constitutional rights are being immediately violated.

II. THERE IS AN INTER-CIRCUIT CONFLICT ON WHETHER AN EXHAUSTION REQUIREMENT MAY BE IMPOSED AS A PRECONDITION TO A SECTION 1983 SUIT INVOLVING A NONPARTY TO A FACIALLY UNCONSTITUTIONAL STATE COURT ORDER.

Respondent claims that Hoover v. Wagner, 47 F.3d 845 (7th Cir. 1995), and McKusick v. City of Melbourne, Fla., 96 F.3d 478 (11th Cir. 1996), support the Sixth Circuit's ruling. To the contrary, those cases highlight the conflict which has now been created by the Sixth Circuit's ruling.

In Hoover, Judge Posner of the Seventh Circuit held the proffered grounds of abstention "inapplicable here because none of the Plaintiffs are being prosecuted for

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[5] Moreover, the Sixth Circuit is in conflict with the Ninth Circuit's ruling that a victim has a right to bring a § 1983 action in federal court regardless of the fact that the state action allegedly violating a person's federally protected rights is of a judicial nature. Miofsky v. Superior Court of California, 703 F.2d 332 (9th Cir. 1982).

anything." 47 F.3d at 848. In Hoover, there were ongoing state proceedings in the state court system, and the challenged injunction was vague and ambiguous and its scope was unclear. Id. at 750-751.[6]

The present case, in contrast, deals with an injunction which is express, clear, and unambiguous. It needs no construction to understand its terms, and no "construction" can change its unambiguous words. The injunction on its face bans everyone from peaceful lawful speech on these public sidewalks. The parties stipulated this, the District Court found it, and the Sixth Circuit knew it.[7]

The other case cited by the defense, McKusick was the same as Hoover. That injunction was likewise ambiguous, and did not contain an "all the world" provision. McKusick, 96 F.3d at 484-485. ("The injunction at issue does not attempt to bind the world at large"). The challenge in McKusick was an as-applied challenge, on how the police were interpreting the injunction. Id.

In contrast, the present case involves a clear and

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[6] As the court found in Hoover, 47 F.3d at 750-751:

> "Plaintiffs seek . . . an interference with an ongoing state court proceeding . . . [and] this extraordinary relief sought [is] on the basis of a handful of examples in which Milwaukee police officers may have over enforced the injunction . . . not tied in any coherent way to the wording of the injunction".

[7] Stip. ¶ 11-12; District Court Finding, ¶ 10; Sixth Circuit Opinion, 142 F.3d at 328 (It "prohibits anyone from picketing.")

unadorned challenge to an injunction which "prohibits anyone from picketing" on these public sidewalks. Gottfried, 142 F. 3d at 328. That is facially unconstitutional. United States v. Grace, 461 U.S. 171 (1983). McKusick thus correctly articulated the law in all of the circuits (except, now, the Sixth) that:

> "Where an injunction is attacked on First Amendment grounds and is facially overbroad, abstention for comity and federalism reasons is inappropriate."

96 F. 3d 478, 489, fn 6. In direct conflict with the Eleventh Circuit, the Sixth Circuit requires abstention in such circumstances.[8]

The question before this court, is whether a federal court faced with an unambiguous and facially invalid state provision may create a new abstention doctrine requiring a victim to exhaust state remedies, by asking a state court to "rewrite the provision" to eliminate the federal unconstitutionality. The Sixth Circuit now requires it. This court has held the opposite:

> "A federal court may not properly ask a state court if it would care in effect to re-write [the unconstitutional provision]."

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[8] Respondent also relies upon Walker v. Birmingham, 388 U.S. 307 (1967), to argue that the preferable means to challenge the constitutionality of a state court injunction is to ask the state court for relief before disobeying it. However, Walker did not involve a nonparty or a facially invalid injunction. Id. at 315.

City of Houston, Texas v. Hill, 482 U.S. 451, 471 (1987).[9]

III. THE STATE COURT ORDER IS FACIALLY UNCONSTITUTIONAL

Next, Respondent argues that the injunction is not clearly directed at prohibiting everyone from picketing, and therefore not facially invalid. Respondent argues that the injunction is ambiguous and only by a "novel reading" could it apply that way. Respondent's argument is meritless.

The Respondents stipulated that the injunction unambiguously bans everyone from picketing on those public sidewalks. The district court stated this in its opinion; and the Sixth Circuit recognized this. As this court stated in Chase National Bank v. City of Norwalk, 291 U.S. 431, 437 (1934), "by extending the injunction to 'all persons to whom notice of the injunction shall come' the district court assumed to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law."

Unfortunately, state court judges frustrated with "picketing problems", are increasingly addressing the situation by merely closing the sidewalks down to everyone including the peaceful general public. That is no different

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[9] O'Shea v. Littleton, 414 U.S. 488 (1974), cited by Respondent, is inapposite. O'Shea was a challenge to variable local practices as applied; there were no allegations that any state provision was unconstitutional on its face.

Likewise inapposite is Ohio Civil Rights Commission v. Dayton City Schools, 477 U.S. 619 (1986), where a party to ongoing state administrative proceedings tried to jump over to federal court.

than the operation of a statute or ordinance. That is what was facing the courts in this case -- and the Sixth Circuit determined to create a new type of abstention -- requiring members of the general public whose First Amendment rights are foreclosed by such a provision to turn first to the state courts to correct such a federal unconstitutionality. That is the naked, unadorned issue presented here -- a new procedure which is seriously inconsistent with U.S. Supreme Court precedent, and directly in conflict with other Circuits.

IV. AVAILABILITY OF RELIEF IN OHIO COURTS.

Respondent's argues that Petitioner should have sought relief in the Summit County Court of Common Pleas through a Rule 60(B) motion under the Ohio Rules of Civil Procedure, that provision is only available to a party or their representative. Respondent is neither. In the Dayton v. Kerns case, the Ohio Supreme Court addressed an injunction expressly issued against the City Clerk regarding an appropriation proceeding. The held that a non-party was not permitted to proceed under Rule 60(B) (formerly R.S. §5354), but was required to file a separate "original action for equitable relief". Kerns, 361 N.E. 2d 247, 249. That is exactly what the Ohio Supreme Court recently explained in State ex rel News Herald v. Court of Common Pleas, 77 Ohio St.3d 40, 671 N.E.2d 5 (Ohio 1996), wherein it indicated that an original action in prohibition was the "only" method for a non-party to challenge a court order infringing public, non-party rights guaranteed under the First Amendment.

As far as the suggestion that Plaintiff "intervene", that also is not allowed. See, Likover v. City of Cleveland, 60 Ohio App. 2d 154 (Cuy. Cty. App. 1978) ("intervention will not be allowed after final judgment or decree has been entered"). The Sixth Circuit recognized this because it

originally issued an opinion and mandate which directed Ms. Gottfried to turn to the "Summit County Court of Common Pleas" for some type of remedy. Recognizing that that is not permitted under Ohio law, and an original action in prohibition is the only available method, the Sixth Circuit amended its mandate, eliminating the directive to go the "Summit County Court of Common Pleas", and substituted instead the directive that she turn to the "state courts". See, Amended Mandate, Appendix "A".

V . THIS COURT SHOULD DECIDE THE REMAINING ISSUES OF LAW RAISED IN GOTTFRIED'S PETITION.

Respondent argues that the final propositions of law were not decided by the lower courts. That is correct, but that is why we are here. Those issues are the reason this case was brought to the federal courts.

The situation raised by this type of increasingly common "all the world" injunction is at the heart of the controversy here. That problem has given rise to an ongoing loss of First Amendment rights; each day is more harm. Therefore, it is crucial for this court to address and correct the abstention dilemma created by the Sixth Circuit. It would be highly appropriate to correspondingly address the unsettling issues presented by this type of injunction, because they are questions of national federal importance.

CONCLUSION: This Court should grant certiorari.

Respectfully submitted,

PATRICK J. PEROTTI, *Counsel of Record*

APR 25 1998

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 538
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

TELEPHONE
(513) 564-7000

April 23, 1998

Patrick J. Perotti
Susan E. Rusnak
Robert M. Gippin
Karen Grasso
Daniel M. McIntyre
Allyson L. Miller-Leonard
Christopher Carl Esker

Re: Case No. 97-3676
Holly Gottfried v. Medical Planning Services, Inc., et al.
District Court No. 95-01569

Dear Counsel:

Enclosed is a corrected copy of a page from the decision originally sent to you April 16, 1998. Please make corrections in your publication version as indicated on page 13, last line of the opinion.

Thank you for your cooperation in this matter.

Yours very truly,

Leonard Green, Clerk

By Linda K. Martin
(Mrs.) Linda K. Martin
Deputy Clerk

Enclosure

cc: Honorable David D. Dowd, Jr.
Geri M. Smith, Clerk
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EXHIBIT
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better position to accommodate Gottfried's constitutional rights through modification or narrow construction of its injunction. This result is more effective and less contentious than asking a federal court to enjoin a state court or to declare its injunctions unconstitutional. Even when there are no jurisdictional bars to such extraordinary relief, a federal court should initially abstain and give due respect to the state court's ability to determine the scope of its injunctions within the constitutional framework. A state court, like a federal court, has a broad duty to avoid serious constitutional issues by interpreting the legal text at issue. We believe this result best accommodates our twin responsibilities of deferring unnecessary constitutional decisions and preventing avoidable conflict between the state and federal courts. The "scrupulous regard for the rightful independence of the state governments" that Justice Frankfurter urged in *Pullman* is all the more warranted now, a half-century later, given that state courts are equal to the task under our Constitution. *See Pullman*, 312 U.S. at 501; *Robb v. Connolly*, 111 U.S. 624, 637 (1884) ("Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States . . .; for the judges of the state courts are required to take an oath to support that constitution, and they are bound by it, and the laws of the United States made in pursuance thereof . . . as the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding'").

For these reasons, we affirm the District Court's decision to abstain, but remand with instructions to reinstate Gottfried's action and stay any further proceedings pending resolution in the ~~Summit County Court of Common Pleas.~~ state courts.